

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

LEE BOYD MALVO,

Defendant

CRIMINAL NO. 102888

Hon. Jane Marum Roush

FILED
CRIMINAL

03 MAY 15 PM 3:53

CLERK, CIRCUIT COURT
FAIRFAX, VA

MOTION FOR CHANGE OF VENUE

TO THE HONORABLE JANE MARUM ROUSH, JUDGE:

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and states as follows:

1. The defendant is charged by the Commonwealth pursuant to Virginia Code Section 18.2-31(13) that he did in the County of Fairfax commit acts which were intended to be acts of terrorism.
2. Under that theory of prosecution, every citizen of Fairfax County is a member of the victim class and would not be a disinterested trier of fact.
3. Prior to April 5, 2003, someone in law enforcement, in contravention of the in-court representation of the Commonwealth's Attorney that discovery documents would not be filed in the public forum until put into evidence at trial, leaked to the media the text of an eleven page summary of statements attributed by the police to defendant Lee Malvo. A front page article setting forth that information appeared in the Washington Post on April 6, 2003.
4. That summary had not then and has not yet been provided to the defense by way of discovery, though it has been provided to the defense by the media and confirmed by the Commonwealth as an accurate reproduction of a police document.

5. The improper release of those alleged statements had the obvious effect of tainting the jury pools in the jurisdictions of northern Virginia where the Washington Post has its principal circulation, including Fairfax County.

6. Whatever representative of law enforcement leaked this document apparently was unwilling to allow the proper presentation of evidence in the course of trial, where the attendant safeguards of cross examination and confirmation of witnesses might allow its lack of reliability and value to be shown to the jury.

7. Therefore its release was designed to put forward evidence outside the courtroom that would otherwise have been subject to in-court testing of reliability. This was clearly an attempt by someone in law enforcement to subvert the judicial process and undermine the ability of the Court, Commonwealth and defense to assure a fair trial of this case on its merits and upon admissible evidence.

8. Exposing the vast majority of members of the jury pool to evidence (whether admissible or inadmissible) in advance of trial and without the safeguards of trial, such as cross examination and confrontation, creates a prejudice that can only be cured by a change of venue.

9. The Virginia Supreme Court has admonished trial courts to “keep in mind that justice must not only be fair, it must also be above suspicion.” Breeden v. Commonwealth, 217 Va. 297, 298, 227 S.E.2d 754, 735 (1976) (citing Wright v. Commonwealth, 73 Va. (32 Grantt.) (941, 943 (1879)).

10. The Court recently ruled that even when an impartial jury can be selected and seated, a change of venue may be proper. In Thomas v. Commonwealth, 263 Va. 216, 233, 559 S.E.2d 652, (2002) the Court noted both the “difficulty of impaneling the jury and the evident influence

of publicity on the jury pool” were significant factors. (Citing Irvin v. Dowd, 366 U.S. 717, 727-28 (1961)).

11. The combination of a jury pool composed of members of the victim class and that same pool being tainted by the improper dissemination by law enforcement of evidence through the media in advance of trial creates not just a suspicion of unfairness but a likelihood of unfairness.

12. “While both victims and society have an interest in punishing those individuals who violate our criminal statutes, no one’s interests are served when the process by which a defendant is found guilty is not above suspicion. The fairness of a criminal proceeding cannot be sacrificed because of the “heinousness of a crime charged, the apparent guilt of the offender or the station in life in which [the defendant] occupies.” Thomas v. Commonwealth, 263 Va. 216, 233, 559 S.E.2d 652 (2002) citing Irvin v. Dowd, 366 U.S. 717, 222 (1961).

13. A change of venue provides the only method of avoiding the obvious appearance and reality of unfairness created by the intentional acts of law enforcement upon an already suspect jury pool.

WHEREFORE the defendant, by counsel, respectfully moves this honorable Court to grant a change of venue for trial of this matter to a jurisdiction outside of the northern Virginia area.

Respectfully submitted,

LEE BOYD MALVO

By__

and Co-Counsel

By

Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road
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703-323-1200
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VSB No: 16593

CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed,
first class mail to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

and the original was forwarded for filing to:

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Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
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this 15th day of May, 2003.

/

Co-Counsel

Co-Counsel

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COMMONWEALTH OF VIRGINIA,

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LEE BOYD MALVO,
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CRIMINAL NO. 102888

MOTION FOR DISCLOSURE OF MATERIALS
PERTAINING TO BALLISTIC TESTING

COMES NOW the Defendant, Lee Boyd Malvo, by counsel, and moves this court to order the production of materials generated during the testing of ballistic evidence in this case. Specifically, Defendant seeks the examiner's notes and any other documents, including photographs produced during or for purposes of testing, noting that Defendant has already received the actual laboratory reports. In support of this motion Defendant states as follows:

1. The Discovery and Inspection Order dated March 3, 2003 directs in pertinent part "...that the Commonwealth permit counsel for the defendant to inspect and copy or photograph any relevant "written reports of autopsies [including that of the victim], ballistic tests, [and] other scientific reports..."
2. In addition, as stated in Virginia Code Section §§9.1-121 as amended, "Upon the request of ... an accused person's attorney, the Division of Forensic Science and the Division of Consolidated Laboratory Services shall furnish to the accused or his attorney the *results* of any investigation which has been conducted by it and which is related in any way to the crime for which the person is accused."
3. In its Order of March 21, 2003 requiring the timely disclosure of exculpatory evidence, this Court accepted the Commonwealth's stipulation that, "...for

purposes of ... any discovery order of this Court, the Commonwealth or the Commonwealth's Attorney shall be deemed to include any law enforcement agencies or prosecutors who are members of the regional task force investigating the offences with which the defendant has been charged."

4. The Commonwealth has provided through discovery laboratory reports from the Bureau of Alcohol, Tobacco and Firearms (ATF) regarding the conclusion reached from ballistic testing performed . (See exhibit 1)
5. Walter Dandridge of the ATF testified at Mr. Malvo's probable cause hearing on January 15, 2003 that photographs were take with a comparison scope of each unknown fragment compared to a known subject.
6. In addition, at the probable cause hearing Mr. Dandridge also testified that he made determination in his testing as to the weight in grams of the fragments and used various magnifications needed to view them.
7. The Ballistic Expert appointed by the Court to assist the accused cannot evaluate the accuracy of the conclusions reached by the ATF without the underlying data. (See exhibit 2)
8. The materials requested: the comparison scope photographs and the work notes of the testing, are material to the defense and their production will not significantly burden the Commonwealth.

WHEREFORE, the Defendant respectfully requests that the Court order the disclosure of the above identified scientific materials pertaining to the ballistic evidence in this case.

Respectfully submitted,
LEE BOYD MALVO

By _____
Co-Counsel

and

By _____
Co-Counsel

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Judge
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this 15 day of May, 2003.

—
/

Co-Counsel

Co-Counsel

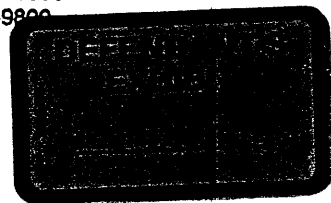


BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

1401 RESEARCH BOULEVARD
ROCKVILLE, MD 20850
Phone: 301-762-9800

DEPARTMENT OF THE TREASURY

Laboratory Report



To: Detective June Boyle
Fairfax County Police Department
4100 Chain Bridge Road
Fairfax, VA 22030

Date of Report: November 7, 2002
Lab Number: 02N0814(1)
Reference: 02287002514
Title: Sniper Shooting
Type of Exam: Firearms/Toolmark

TITLE: LINDA FRANKLIN

The evidence described below was received from Richard Strobel (hand carried) on October 15, 2002:

EXHIBITS

- 1 One lead fragment
- 2 One copper bullet jacket fragment
- 3 One copper bullet jacket

The evidence described below was received from Allan W. Stratos (hand carried) on October 24, 2002 and submitted under laboratory number 02N0871.

EXHIBITS

- 06 One Bushmaster, caliber .223 Remington semiautomatic rifle, model XM15-E2S, serial number L284320
- 06A One Colt, caliber .223 Remington, staggered column, spring actuated detachable box magazine

RESULTS OF EXAMINATION

Exhibit 06 was examined, found to function normally and test fired.

Exhibit 06A magazine fits and functions in the Exhibit 06 rifle.

Exhibit 3 is a caliber .223 Remington copper bullet jacket, which was identified as having been fired from the Exhibit 06 Bushmaster rifle.

Exhibit 2 is a copper bullet jacket fragment, which was identified as having been fired from the Exhibit 06 Bushmaster rifle.

Exhibit 1 is a lead fragment, which has no identifiable characteristics.

DISPOSITION OF EVIDENCE

The evidence will be retained in the laboratory until called for by a representative from your office.

Walter A. Dandridge, Jr.
Firearms/Toolmark Examiner

REVIEWED BY:

Timothy J. Curtis
Chief, Firearms Section

CC: Special Agent Scott E. Riordan
Bureau of Alcohol, Tobacco and Firearms
6525 Belcrest Road, Suite 680
Hyattsville, MD 20782

1 you make an identification?

2 A Yes. If the class characteristics are not the
3 same --

4 Q -- you're out of the game.

5 A -- you're out of the game.

6 Q Right.

7 A If the class characteristics are the same, as
8 what I had on the fired bullets, then it behooves a
9 firearms examiner to look at the individual
10 characteristics to identify or eliminate whether they were
11 fired from that firearm.

12 Q Now, if you have class characteristics that
13 agree but you have an insufficient correlation between the
14 individual characteristics, what is that?

15 A It's a non-identification.

16 Q It's an exclusion?

17 A Yes.

18 MR. WALSH: May I see Exhibit 7?

19 (Pause.)

20 BY MR. WALSH:

21 Q All right. In Exhibit 7 you have three
22 envelopes. You have identified those already; is that
23 correct?

1 A Yes.

2 Q All right. And on Exhibit -- well, I'm going
3 to say No. 2 within that, you testified today that that
4 was a -- you determined excluding all other firearms that
5 it came from this firearm; is that correct?

6 A That is correct.

7 Q Now let me ask you, on that No. 2, what is
8 that?

9 A Exhibit No. 2 on Commonwealth's Exhibit No. 7
10 is a copper bullet jacket fragment.

11 Q What is the size of that fragment? Did you
12 have an opportunity to determine the size?

13 A The weight of it was 4.2 grains.

14 Q How many striae were you able to determine on
15 that unknown bullet?

16 A Enough to call it an identification.

17 Q Can you tell me the number?

18 A The number of lands impressions or the number
19 of striae?

20 Q Striae.

21 A Enough to call an identification.

22 Q You can't determine how many striae?

23 A As I stated earlier, we don't count to see if

1 it has six lands or striae, individual striations, or
2 forty individual striations.

3 Q How many lands on that?

4 A I would have to refer to my notes if I --

5 Q Do you have your notes with you?

6 A Actually, can I open this?

7 Q Check with Mr. Horan.

8 MR. HORAN: That's fine.

9 (The witness opened the exhibit.)

10 BY MR. WALSH:

11 Q That is No. 2; is that correct?

12 A That is. I see four land impressions on this.

13 Q When you analyzed that in the comparison
14 microscope, what magnification did you use?

15 A Actually probably 2.5, but I would have to
16 refer to my notes.

17 Q Do you have your notes with you?

18 A I do. And stepping back a moment, looking at
19 my notes, I listed five land impressions visible as
20 opposed to four that I just stated. Four-x or 40.

21 Q Forty? That's the highest; isn't it?

22 A No. We have microscopes that go higher.

23 Q How many -- I'm going to talk about that same

1 lab report. How many test bullets did you compare to that
2 unknown?

3 A To Exhibit No. 2?

4 Q Yes, sir.

5 A Test bullets?

6 Q Yes.

7 A Well, the test bullets that I fired from the
8 firearm.

9 Q You fired four.

10 A I fired -- I looked at one.

11 Q Okay. So you used one to compare it with that
12 one; is that correct?

13 A Yes.

14 Q Let me ask you this -- I'm getting ahead of
15 myself -- did you use one to compare it with all those
16 three envelopes?

17 A Two of them, yes.

18 Q Okay. How about -- you testified to Exhibit
19 No. 13. Did you use that same test bullet?

20 A Thirteen --

21 Q Which is another time that you did the test --
22 Commonwealth's 13. I'm sorry.

23 A Yes, I used one.

1 Q Consistently all the way through?

2 A Yes.

3 Q Okay. That answers my question. Does that
4 unknown have any accidental characteristics?

5 A Tell me what you mean exactly by accidental
6 characteristics.

7 Q Unique to the unknown, a unique marking to the
8 unknown.

9 A Did this unknown fragment have a unique
10 marking to the --

11 Q To it. Does it have any marking --

12 A To itself?

13 Q Yes. Unique from the test.

14 A Yes, it had unique markings.

15 Q Okay. That's all I wanted to know. No. 3
16 which is the bag you also have out, the same lab report --

17 A Yes.

18 Q What size is that fragment?

19 A It weighed 8.6 grains.

20 Q Let me back up to one question on the other
21 one. The recovery of that fragment, do you ever determine
22 or require where the fragment was recovered while doing
23 your analysis?

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JOHN E. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

Criminal No. 102888

Defendant.

COMES NOW Defendant, Lee Boyd Malvo, by counsel, and moves this court on June 2, 2003, at 10:00 a.m., or as soon thereafter as counsel may be heard, to appoint and fund a handwriting expert to assist counsel for Mr. Malvo in the preparation of his case, and in support thereof states as follows:

On March 14, 2003, defense counsel herein filed a motion for experts and incorporated memorandum of law. The generalized argument supporting the request for experts which referenced both the Ake, Caldwell and Husske line of cases, along with Daubert and its progeny, is hereby incorporated herein by this reference.

Specifically, defense counsel now seeks the appointment and funding of a handwriting expert. The Commonwealth presented to defense a “report” by their own handwriting expert which reaches certain conclusions about common authorship based on an analysis of “notes” found at alleged crime scenes. It is anticipated that testimony in support of the report will be

offered. An inspection of the handwritten notes themselves indicates that there are discrepancies in the way certain similar letters are written, and different spellings of the same word, which immediately could call for a different conclusion than the one reached in the “report.” Obviously, defense counsel cannot offer such an opinion, but must rely on an expert to analyze the handwriting.

Even if the prosecution does not offer evidence of the authorship of the alleged notes, an independent defense expert’s analysis of the handwriting on those notes will be relevant and material to the defense. First, in order to prepare for the possibility that the prosecution may offer the notes as rebuttal evidence (“trial shield”). Second, for the exculpatory evidence that may be revealed by analysis (“trial sword”).

Additionally, with regard to the Daubert analysis referenced above, one Federal Fourth Circuit court recently decided that a handwriting expert’s testimony met virtually none of Daubert’s reliability standards, and limited the testimony to a description of points of similarity of samples, without any conclusions as to common authorship. United States v. Hines, 55 F.Supp.2d 62 (D.Md. 1999).

As noted earlier, defense counsel previously filed a motion and incorporated memorandum for the appointment of experts in this case, which motion was heard by the Court on March 28, 2003. One of the experts sought during that motion was a handwriting expert, which request was conditionally denied. In the course of the argument presented in support of that motion, the Commonwealth represented that it sought, through its “report,” only to establish that two notes were written by the same individual, without connecting that authorship to Mr. Malvo. In response to that statement, counsel for Mr. Malvo indicated that the alleged connection to Mr. Malvo concerning the notes would be made by way of fingerprint or DNA evidence obtained from

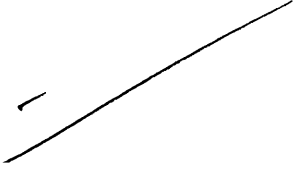
at least one of the notes, thereby implicating authorship of both notes to Mr. Malvo. The Commonwealth then answered defense counsel's concerns by stating that there would be no such linking evidence with regard to the notes. Accordingly, the Court denied counsel's request, but noted the denial was based on the Commonwealth's representations as indicated above. The Court indicated in its March 31, 2003 order "... [t]he motion as to a handwriting expert was denied without prejudice to being renewed should the Commonwealth's attorney seek to tie any writings to Mr. Malvo by any forensic evidence."

Subsequent to that motion, the Commonwealth did make defense counsel aware that both notes were found in plastic bags, and fingerprint and/or DNA evidence would be offered to establish a link to Mr. Malvo, which evidence was allegedly obtained from at least one of the bags in which the notes were found. Thus, the condition under which new consideration of the motion for the appointment and funding of a handwriting expert has arisen, and clearly requires the granting of the motion.

It should also be noted that the resources required for such an expert will be modest. Counsel for Mr. Malvo submitted to the Court and the Commonwealth details concerning the proposed defense expert, his credentials, his rates and estimations of the time required for his services. Our rough estimates indicated that his anticipated services would not exceed a cost of \$2,500.00 for the case.

WHEREFORE, based on the Court's earlier ruling, along with the Commonwealth's representation that the prosecution will attempt to connect handwriting samples to Mr. Malvo, the Defendant respectfully requests the appointment and funding of a Handwriting Expert.

Respectfully submitted,
LEE BOYD MALVO

By:  _____
and Co-Counsel

By: _____
Co-Counsel 

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Co-Counsel

and 

 _____
Co-Counsel

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JUDITH FREY
CLERK, CIRCUIT COURT
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COMMONWEALTH OF VIRGINIA,

v.

LEE BOYD MALVO,

Defendant.

Criminal No. 102888

**MOTION FOR DISCLOSURE OF SCIENTIFIC MATERIALS
PERTAINING TO DNA TESTING AND INCORPORATED
MEMORANDUM OF LAW**

COMES NOW Defendant, Lee Boyd Malvo, by counsel, and moves this court to order the production of certain scientific materials pertaining to the testing of DNA evidence in this case under Virginia Code Section 9.1-121, *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, *Ake v. Oklahoma*, 470 U.S. 68 (1985) and its progeny, the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and sections Eight and Eleven of Article I of the Constitution of Virginia.

In support of this motion counsel states:

The Commonwealth has provided through discovery a report regarding DNA evidence indicating that DNA testing was performed on a number of pieces of evidence by the DNA Analysis Unit 1 of the Federal Bureau of Investigation. The Commonwealth has indicated that this report is incomplete and that additional DNA evidence is still being tested by the FBI. The report includes the conclusions of the FBI analyst with regard to comparison of recovered DNA

to known samples, and the statistical estimations of the probability of random matches. The DNA expert appointed by the Court to assist the accused cannot evaluate the accuracy of these conclusions without knowledge of the underlying data, results of intermediate scientific procedures, protocols used by the laboratory, the software and its macros used by the laboratory, the statistical data applied to determine the probability estimations, instances of unintended DNA transfer or contamination, the accreditation of the laboratory, and the background of the personnel involved in the scientific investigation.

In 2001 the Virginia General Assembly significantly liberalized the discovery of materials related to scientific investigations conducted in criminal cases. Virginia Code Section 9.1-121 as amended states, in pertinent part:

“Upon... the request of an accused person’s attorney, the Division of Forensic Science or the Division of Consolidated Laboratory Services shall furnish to the accused or his attorney the results of any investigation which has been conducted by it and which is related in any way to a crime for which the person is accused.”

This code section goes on to describe the manner in which an attorney may request the state authorities to perform an investigation on behalf of his client, also indicating that the results shall be furnished to the attorney. Thus, the clear intent and effect of the legislature’s efforts was to provide the accused access behind the curtain of the forensic laboratory in order to confront evidence produced by scientific investigation.

This Court has recognized that the unique jurisdictional tangles in this case cannot be used to prevent the accused from obtaining discoverable materials. In its order of March 21, 2003 requiring the timely disclosure of exculpatory evidence, this Court accepted the Commonwealth’s stipulation (made at the request of the defense) that,

“...for the purposes of... any discovery order of this Court, the ‘Commonwealth’ or the ‘Commonwealth’s Attorney’ shall be deemed to include any law enforcement

agencies or prosecutors who are members of the regional task force investigating the offenses with which the defendant has been charged.”

The Federal Bureau of Investigation is a law enforcement agency in the regional task force and, in this case, has served as the functional equivalent to the Virginia laboratories.

Furthermore, *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 87 (1976), *Stover v. Commonwealth*, 211 Va. 789 (1971), *Dozier v. Commonwealth*, 219 Va. 1113 (1979), and *Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 6156 (1988) require that the Commonwealth’s Attorney produce and divulge to counsel for the accused all information of whatever form, source or nature which tends to exculpate the accused or reduce the penalty which he might suffer should he be convicted in this case.

Meanwhile, *Ake v. Oklahoma*, 470 U.S. 68 (1985), adopted by Virginia in *Husske v. Commonwealth*, 252 Va. 203 (1996), mandates that the Commonwealth must “provide indigent defendants with the basic tools of an adequate defense.” *Husske*, 252 Va. at 212 (internal quotation marks and citation omitted).

The documents identified below are material to the defense and their production will not burden the Commonwealth’s Attorney (See Exhibit 1, the Declaration of the Molecular Biologist appointed by this Court to assist the accused).

The above authority requires the production of the following materials:

- a. **Case file:** A complete copy of the case file including all records made by the laboratory in connection with this case, including photographic quality copies of any photographs.
- b. **Laboratory Protocols:** A copy of all standard operating protocols (SOPs) used in connection with testing in this case.
- c. **Chain of custody and current disposition of evidence:** Copies of all records

that document the treatment and handling of biological evidence in this case, from the initial point of collection up to the current disposition. This information should include documentation that indicates where and how the materials were stored (temperature and type of container), the amount of evidence material that was consumed in testing, the amount of material that remains, and where and how the remaining evidence is stored (temperature and type of container).

d. **Software:** A list of all commercial software programs used in the DNA testing in this case, including the name of the software program, the manufacturer and the version used in this case.

e. **Macros:** If the results produced by the software are dependent on the instructions contained in macros, please provide copies of any macros used. (For analyses performed with GeneScan and Genotyper, these macros are contained in Genotyper output files in order to allow analysts to interpret the results. A copy of the Genotyper output files is satisfactory).

f. **Data files:** Copies of all data files used and created in the course of performing the testing and analyzing the data in this case. These files should include all data necessary to, (i) independently reanalyze the raw data, and (ii) reconstruct the analysis performed in this case. For analyses performed with GeneScan and Genotyper, these materials should include all collection files (such as injection lists and log files for an ABI 310 analysis); all Genescan files, including sample files and project files; and all Genotyper files, including templates/macros.

g. **STR frequency tables:** Copies of any allelic frequency tables relied upon in making statistical estimates in this case. If the laboratory relied upon published or publicly available data, a specific reference to the source is satisfactory.

h. **Instances of unintended DNA Transfer or Sample Contamination:** Copies

of all records maintained by the laboratory that document instances of unintended transfer of DNA or sample contamination in this case, such as the detection of unexpected extra alleles in control or reference samples, and any corrective measures taken.

i. **Accreditation:** Copies of all licenses or other certificates of accreditation held by the DNA testing laboratory.

j. **Laboratory personnel:** Background information about each person involved in conducting or reviewing the DNA testing performed in this case, including a current resume, job description, and a summary of proficiency test results.

WHEREFORE, the Defendant respectfully requests that the Court order the disclosure and production of the above identified scientific materials pertaining to the DNA evidence in this case in a timely fashion so that the Defendant's experts can analyze the materials without causing any delay in the trial of this case.

Respectfully submitted,

LEE BOYD MALVO

By: _____
Co-Counsel
and

By: _____
Co-Counsel

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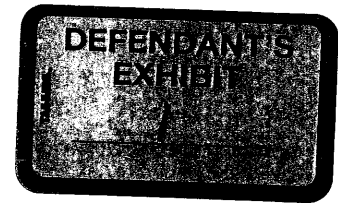
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**Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
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4110 Chain Bridge Road
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this 15th day of May, 2003.

— and Co-Counsel

Co-Counsel



Declaration of Dan E. Krane, Ph.D.

- 1.) I am an associate professor in the Department of Biological Sciences at Wright State University in Dayton, Ohio. I am also the assistant director of Wright State University's Biomedical Sciences Ph.D. program and the lead author of an undergraduate textbook (Fundamentals of Bioinformatics, published by Benjamin Cummings, Inc.) that pertains to the use of computers to analyze biological data at a molecular level. I earned a Ph.D. for my work in the area of molecular biology from the department of Cell and Molecular Biology at the Pennsylvania State University in 1991. Since that time I have received additional training in the fields of population genetics and molecular evolution as a post-doctoral researcher working in the laboratory of Dr. Dan Hartl at both Washington University in St. Louis, MO. and at Harvard University in Cambridge, MA. I have published over 30 articles in peer-reviewed journals and given numerous presentations to professional meetings on topics such as the analysis of human DNA profiles, the accumulation of mutations within the human genome and the effects of pollutants on genetic diversity. My EPA- and NSF-funded research laboratory has generated approximately 15,000 DNA profiles from a variety of different types of organisms in each of the past five years. I have testified as an expert in the fields of molecular biology, population genetics and forensic DNA analysis in over 50 criminal proceedings in 14 different states and federal court over the past 12 years.
- 2.) I am very familiar with STR DNA testing of the type performed by the crime laboratories across the United States such as that performed by the Federal Bureau of Investigation in the case of Commonwealth v. Lee Boyd Malvo (Fairfax County, VA; case number K102888). I well acquainted with the professional literature on STR testing. I participated in a 3-day training course on STR testing at the National Forensic Science Research and Training Center, in Tampa Florida. I have observed STR testing being conducted and have made a careful study of STR test results in more than thirty cases while serving as a consultant to lawyers who were offering or challenging STR evidence in court cases. I have been qualified and testified in court as an expert on STR testing on at least five separate occasions.
- 3.) I have been asked by attorney John Strayer to express an opinion about whether a government forensic laboratory, such as the Federal Bureau of Investigation, should be required to disclose the electronic data files created in the course of STR testing to lawyers representing a defendant who is allegedly incriminated by the results of the STR test. For reasons I will explain below, I believe it is essential that the electronic data files be provided to the defense in criminal cases where STR test results will be at issue.
- 4.) I believe that a defense expert cannot competently evaluate the results of an STR DNA test without having access to the test's underlying electronic data. In my experience, review of electronic data has often led directly to the discovery of important problems or limitations in the STR testing, or to alternative theories of the evidence, that would not have been apparent based on a review of laboratory reports or other laboratory

records. Review of the electronic data frequently reveals: evidence of unnoticed additional contributors to evidence samples; failures of essential control experiments; abnormalities in the running of the machines used to perform the analyses; the identification/confirmation of technical artifacts of the testing procedure itself (i.e. phenomena such as "pull-up" and other matrix failures). These issues cannot be critically addressed by a review of test result print outs, summary reports or laboratory bench notes. In my opinion, review of the electronic data is as important as review of the laboratory's written notes.

- 5.) My opinion on this issue is widely shared. In my experience, it is general and routine practice throughout the United States for prosecutors to provide to defense lawyers, on request, all underlying laboratory notes and records related to the government's DNA evidence, including electronic files. Laboratories that have routinely provided electronic data suitable for such reviews in my own experience include: the Federal Bureau of Investigation; the Minnesota State Bureau of Criminal Apprehension; Cellmark Laboratories; Lifecodes Laboratory; the Indiana State Police; the Illinois State Police, Forensics Associates; the Kentucky State Police Crime Laboratory; the Serological Research Institute (SERI); and the San Francisco Police Department Crime Laboratory.
- 6.) There is no legitimate reason for a laboratory to refuse a defendant's request to examine the electronic data. The files are easy to copy to a CD-ROM, Zip disk, or other media. (A CD-ROM is the preferred method for transmitting the data because it provides a permanent record that cannot easily be altered). It takes only a few minutes for a competent operator to identify and copy the relevant files. Copying is accomplished through a simple point and click operation with the computer cursor. The request is in no way burdensome and, in fact, should be much easier to provide than paper copies of a fraction of the underlying data.

Dan E. Krane
Dayton, Ohio
May 14, 2003

On this 14th day of May 2003 before me a Notary Public in and for the County of Montgomery and State of Ohio, personally appeared the above named Dan E. Krane personally known to me, and acknowledged the execution of the foregoing as a free act and deed for the purposes herein set forth.

ELLEN REINSCH FRIESE,
Notary Public
In and for the State of Ohio
My Commission Expires 4/5/2008